

ORIGINAL
JOHNSON UTILITIES, L.L.



0000038248

5230 East Shea Boulevard * Scottsdale, Arizona 85254
PH: (480) 998-3300; FAX: (480) 483-7908

January 10, 2006

Brian Bozzo
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

RE: Johnson Utilities, L.L.C.: Compliance with Decision No. 68237
Quarterly Reports on the status of the pending La Osa and Sonoran litigation
ACC Docket Nos.: WS-02987A-04-0288

Dear Mr. Bozzo:

Pursuant to the above-referenced matter, Johnson Utilities hereby submits this compliance filing in accordance with the Commission's orders. Enclosed please find the court documents from the last quarter of 2005 that have been filed in the La Osa Litigation since our last ACC filing. The documents have been attached hereto as Attachment No. 1. The report on the Sonoran litigation is that it had a change in venue to Pinal County over the last quarter as referenced in the minute entry attached hereto as Attachment 2.

If you need any additional information in regards to this compliance item, please do not hesitate to contact me. Thank you for your time and consideration in this matter.

Sincerely,

Daniel Hodges
Johnson Utilities, LLC

Cc: Brian Tompsett, Johnson Utilities
Richard Sallquist, Sallquist, Drummond & O'Connor
Ernest Johnson, Director
Docket Control

AZ CORP COMMISSION
DOCUMENT CONTROL

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ATTACHMENT 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-002692

01/03/2006

HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT
D. Whitford
Deputy

FILED: 01/04/2006

ARIZONA STATE, et al.

CRAIG W SOLAND

v.

GEORGE H JOHNSON, et al.

CHRISTOPHER G STUART

LAT J CELMINS
JOHN M DICARO
HARRY L HOWE
LISA K HUDSON

CONFERENCE SET

This case having been reassigned to Judge Fields,

IT IS ORDERED setting a Case Management Conference for **February 13, 2006 at 9:30 a.m.****Before:**The Honorable Kenneth Fields
Maricopa County Superior Court
Central Court Building
Courtroom 704
Phoenix, AZ 85003
PHONE: 602-506-2060**ELECTRONIC ("E") COURTROOM**A record of the proceedings may be made by videotape in lieu of a court reporter. Should an official transcript be required, you may request that the Court prepare it. The party ordering the
Docket Code 026 Form V000A Page 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-002692

01/03/2006

transcript must pay for it. With this new technology, a court reporter is likely not required and the parties are encouraged to experience the Court's video-recording system before requesting a court reporter.

If a court reporter is required, a written request must be received by the Court at least 48 hours before the hearing.

NOTICE

New Fee for Copies of Electronically Recorded Proceedings

Effective Monday, January 27, 2003, a fee of \$20.00 will be charged for each copy of superior court proceedings digitally recorded and provided on compact Disc (CD) and for each copy of a superior court proceeding provided on videotape. The fee is due when the CD or videotape is picked up. Cash and in-state checks will be accepted for payment. Please make checks payable to: Clerk of the Superior Court.

Blank, unused CDs and videotapes will not be accepted in lieu of payment.

Beginning Monday, January 27, 2003, the pick up location for CD or videotape copies of superior court proceedings recorded in downtown Phoenix will be the court's Self Service Center located in the Law Library on the first floor of the East Court Building. Fees will be collected at the Self Service Center. Copies of superior court proceedings recorded at the court's Southeast Facility in Mesa and at the court's Northwest Facility in Surprise may be picked up, and fees paid, at the Self Service Centers at those locations.

Questions may be directed to Ken Crenshaw, Administrator, Electronic Records Services, 602-506-7100 or kcrensha@superiorcourt.maricopa.gov

Request for Daily Copy of Electronically Recorded Proceedings

Obtain a form from the courtroom clerk or from the Self Service Center to request a daily copy of a court hearing or trial proceeding being conducted. Pay the applicable fee at the Self Service Center. Attach the receipt showing payment of fee and present both the receipt and the form to the courtroom clerk or bailiff. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

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Michael L. Kitchen (019848)
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5 *The George H. Johnson Revocable Trust and*
George H. Johnson and Jana Johnson, co-trustees,
6 *The Ranch at South Fork, LLC, General Hunt Properties, Inc.,*
and Atlas Southwest, Inc.

7
8 **SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF MARICOPA**

10 STATE OF ARIZONA, *ex rel*, STEPHEN
A. OWENS, Director, Arizona
11 Department of Environmental Quality;
MARK WINKLEMAN, Commissioner,
12 Arizona State Land Department;
ARIZONA GAME AND FISH
13 COMMISSION; DONALD BUTLER,
Director, Arizona Department of
14 Agriculture; ARIZONA BOARD OF
REGENTS, on behalf of the Arizona
15 State Museum,

Plaintiffs

16 v.

17 GEORGE H. JOHNSON and JANA S.
JOHNSON, husband and wife; THE
18 GEORGE H. JOHNSON revocable
trust, and GEORGE H. JOHNSON and
19 JANA JOHNSON, co-trustees;
JOHNSON INTERNATIONAL, INC.;
20 THE RANCH AT SOUTHFORK, LLC;
GENERAL HUNT PROPERTIES,
21 INC.;ATLAS SOUTHWEST, INC.; KARL
ANDREW WOEHLCKE and LISA
22 WOEHLCKE, husband and wife;
JOHN DOE and JANE DOE, husband
23 and wives, 1 through 10; ABC
CORPORATIONS, 1 through 10,

24 Defendants.

Case No. CV2005-002692

**NOTICE OF CHANGE
OF JUDGE**

*(Presently Assigned to the
Honorable Janet Barton)*

1 GEORGE H. JOHNSON; JOHNSON
2 INTERNATIONAL, INC.,

3 Counterclaimants,

4 v.

5 ARIZONA DEPARTMENT OF
6 ENVIRONMENTAL QUALITY,
7 STEPHEN A. OWENS and JANE DOE
8 OWENS, husband and wife, OFFICE
9 OF THE ATTORNEY GENERAL, TERRY
10 GODDARD and JANE DOE
11 GODDARD, husband and wife,

12 Counterdefendants.

13 GEORGE H. JOHNSON and JANA S.
14 JOHNSON, husband and wife; THE
15 GEORGE H. JOHNSON revocable
16 trust, and GEORGE H. JOHNSON and
17 JANA JOHNSON, co-trustees;
18 JOHNSON INTERNATIONAL, INC.;
19 THE RANCH AT SOUTHFORK, LLC;
20 GENERAL HUNT PROPERTIES, INC.;
21 ATLAS SOUTHWEST, INC.,

22 Third Party Plaintiffs,

23 v.

24 3F CONTRACTING, INC.; BILL
25 PRESTON WELL DRILLING dba
26 PRESTON WELL DRILLING; JOHN
27 AND JANE DOES 1-10; ABC
28 PARTNERSHIPS 1-10; ABC LIMITED
LIABILITY COMPANIES 1-10; XYZ
CORPORATIONS 1-10,

Third Party Defendants.

George H. Johnson and Jana S. Johnson, Husband and Wife; the George H.
Johnson Revocable Trust, and George H. Johnson and Jana Johnson, Co-
Trustees; Johnson International, Inc.; the Ranch at Southfork, LLC; General
Hunt Properties, Inc.; Atlas Southwest, Inc., Third Party Plaintiffs and George H.
Johnson and Johnson International, Inc., Counterclaimants, pursuant to the

1 provisions of Rule 42(f), Ariz.R.Civ.P., hereby exercise the right to a change of
2 judge in this matter. The name of the Judge to whom this matter is presently
3 assigned and who is to be changed by virtue of this Notice is the Honorable Janet
4 Barton.

5 Undersigned counsel for Third Party Plaintiffs and Counterclaimants
6 hereby certifies that this Notice of Change of Judge is timely under the Rules,
7 that the right to secure a change of judge by notice has not previously been
8 waived, and that Third Party Plaintiffs have not previously been granted a change
9 of judge as a matter of right in this case.

10
11 DATED this 15th day of December, 2005.

12 **MARGRAVE CELMINS WHITEMAN, P.C.**

13
14 /s/ Lat J. Celmins
15 Lat J. Celmins
16 Michael L. Kitchen
17 *Attorneys for Johnson Defendants*
18 *and Counterclaimants*

19 **Copy** of the foregoing delivered via LexisNexis
20 File and Serve this 15th day of December, 2005 to:

21 Honorable Barbara Rodriguez Mundell
22 Presiding Judge
23 **MARICOPA COUNTY SUPERIOR COURT**
125 West Washington
Phoenix, Arizona 85003

24 Honorable Janet Barton
25 **MARICOPA COUNTY SUPERIOR COURT**
125 West Washington
Phoenix, Arizona 85003

1 Court Administrator
2 **Maricopa County Superior Court**
3 201 W. Jefferson
4 Phoenix, AZ 85003

5 Terry Goddard
6 Attorney General
7 Craig Soland
8 Special Counsel
9 1275 West Washington
10 Phoenix, Arizona 85007

11 Barry Mitchell
12 **GALLAGHER & KENNEDY, P.A.**
13 2575 East Camelback Road
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23 Bill Preston
24 **BILL PRESTON WELL DRILLING**
25 7902 East McDowell Road
26 Mesa, Arizona 85207

27 Marc Budoff
28 111 West Monroe Street, Suite 1212
Phoenix, Arizona 85003-1732

29 /s/ Kathy Allison

30 N:\WP50\JOHNSON\La Osa\Notice of Change of Judge.wpd

Michael K. Jeanes, Clerk of Court
Electronically Filed
Michelle Paigen
Transaction ID 7705484
Dec 22 2005 10:38AM MST

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5 *The George H. Johnson Revocable Trust and*
George H. Johnson and Jana Johnson, co-trustees,
6 *The Ranch at South Fork, LLC, General Hunt Properties, Inc.,*
and Atlas Southwest, Inc.

7 **SUPERIOR COURT OF ARIZONA**

8 **COUNTY OF MARICOPA**

9
10 STATE OF ARIZONA, *ex rel*, STEPHEN
A. OWENS, Director, Arizona
11 Department of Environmental Quality;
MARK WINKLEMAN, Commissioner,
12 Arizona State Land Department;
ARIZONA GAME AND FISH
13 COMMISSION; DONALD BUTLER,
Director, Arizona Department of
14 Agriculture; ARIZONA BOARD OF
REGENTS, on behalf of the Arizona
15 State Museum,

Plaintiffs

16 v.

17 GEORGE H. JOHNSON and JANA S.
JOHNSON, husband and wife; THE
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trust, and GEORGE H. JOHNSON and
19 JANA JOHNSON, co-trustees;
JOHNSON INTERNATIONAL, INC.;
20 THE RANCH AT SOUTHFORK, LLC;
GENERAL HUNT PROPERTIES,
21 INC.; ATLAS SOUTHWEST, INC.; KARL
ANDREW WOEHLCKE and LISA
22 WOEHLCKE, husband and wife;
JOHN DOE and JANE DOE, husband
23 and wives, 1 through 10; ABC
CORPORATIONS, 1 through 10,

24 Defendants.

Case No. CV2005-002692

**NOTICE AND STIPULATION OF
EXTENSION OF TIME FOR
COUNTERCLAIMANTS TO FILE
THEIR RESPONSE TO COUNTER-
DEFENDANTS' MOTION TO DISMISS
COUNTERCLAIM AND FOR
COUNTERDEFENDANTS' REPLY**

(Non-Classified Civil-Complex)

(Assigned to the Honorable
Kenneth L. Fields)

1 GEORGE H. JOHNSON; JOHNSON
2 INTERNATIONAL, INC.,

3 Counterclaimants,

4 v.

5 ARIZONA DEPARTMENT OF
6 ENVIRONMENTAL QUALITY,
7 STEPHEN A. OWENS and JANE DOE
8 OWENS, husband and wife, OFFICE
9 OF THE ATTORNEY GENERAL, TERRY
10 GODDARD and JANE DOE
11 GODDARD, husband and wife,

12 Counterdefendants.

13 The Parties hereby stipulate and agree that the Responses to the Motions to
14 Dismiss Counterclaim and Alternative Motion to Stay and Bifurcate Discovery
15 shall be due from Defendants/Counterclaimants on January 16, 2006. The
16 Parties also stipulate and agree that Plaintiff/Counterdefendants' Replies to both
17 of these Motions shall be due on February 1, 2006.

18 DATED this _____ day of December, 2005.

19 **MARGRAVE CELMINS WHITEMAN, P.C.**

20 /s/ Lat J. Celmins

21 Lat J. Celmins

22 Michael L. Kitchen

23 *Attorneys for Johnson Defendants*
24 *and Counterclaimants*

25 **TERRY GODDARD**

26 Attorney General

27 /s/ Lisa K. Hudson

28 Lisa K. Hudson

Michael K. Goodwin

Michael G. Walker

Attorneys for Plaintiff and
Counterdefendants

1 **Copy** of the foregoing delivered via LexisNexis
2 File and Serve this 22nd day of December, 2005 to:

3 Honorable Kenneth L. Fields
4 **MARICOPA COUNTY SUPERIOR COURT**
5 201 West Jefferson
6 Phoenix, Arizona 85003

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28 Scottsdale, Arizona 85253-1479
Attorney for Defendants Karl Andrew Woehlecke
and Lisa Woehlecke

19 **Copy** of the foregoing mailed this
20 22nd day of December, 2005 to:

21 Gerald T. Hickman
22 **JARDIN, BAKER, HICKMAN & HOUSTON**
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24 Phoenix, Arizona 85012
25 Email: ghickman@jbhh.com
26 Attorney for Third-Party Defendant
27 Bill Preston Well Drilling

28 /s/ Kathy Allison

26 N:\WP50\JOHNSON\La Osa\Notice to Extend Time.wpd
27 December 22, 2005

Michael K. Jeanes, Clerk of Court
Electronically Filed
Michelle Paigen
Transaction ID 7671813
Dec 16 2005 6:57PM MST

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8 **ARIZONA SUPERIOR COURT**

9 **MARICOPA COUNTY**

10
11 **STATE OF ARIZONA, et al.,**

12 Plaintiffs,

13 v.

14 **GEORGE H. JOHNSON and JANA S.**
15 **JOHNSON, husband and wife, et al.,**

16 Defendants.

17 **GEORGE H. JOHNSON, et al.,**

18 Counterclaimants,

19 v.

20 **ARIZONA DEPARTMENT OF**
21 **ENVIRONMENTAL QUALITY, et al.,**

22 Counterdefendants.

Case No: CV 2005-002692

COUNTERDEFENDANTS'
ALTERNATIVE MOTION TO STAY
AND BIFURCATE DISCOVERY

(Complex Litigation – Civil)

(Assigned to the Hon. Janet Barton)

(Oral Argument Requested)

23 **Preliminary Statement**

24 May a party file a counterclaim against opposing counsel? Should a counterclaim
25 and the main action be litigated together when they arise out of a different series of
26

1 transactions, raise different legal issues, and involve different parties? Should a
2 counterclaim and the main action be litigated simultaneously when the counterclaim is in
3 the nature of a claim for malicious prosecution? Should they be litigated simultaneously
4 when the counterclaim is likely to be rendered moot by the main action?

5 Because the answer to all of these questions is "no," there are serious questions
6 about how the counterclaim should proceed—if it should proceed at all. The counterclaim
7 arises from alleged statements relating to the litigation. In effect, the counterclaimants—
8 the Johnson Defendants—are suing others for suing them. It is a tactical move designed to
9 hamper the State's prosecution of the principal case. As explained in the Motion to
10 Dismiss, the counterclaim really should be dismissed. Alternatively, it should be
11 bifurcated from the principal case and stayed pending a determination of that case.

12 **I. Factual and Procedural Background**

13 **A. The Principal Case**

14 On February 14, 2005, the State filed a Complaint against George H. Johnson and
15 Jana S. Johnson, the George H. Johnson Revocable Trust, Johnson International, Inc., The
16 Ranch at South Fork LLC, General Hunt Properties, Inc., and Atlas Southwest, Inc.
17 (collectively, "Johnson"). Karl Andrew Woehlecke and Lisa Woehlecke are also named as
18 defendants and are represented by separate counsel. The Complaint, as amended, charges
19 Johnson with numerous violations of State law, including illegally bulldozing and clearing
20 approximately 270 acres of State Trust Lands, destroying thousands of protected native
21 plants on State Trust Lands, destroying portions of seven major archaeological sites on
22 State Trust Lands, bulldozing and clearing an estimated 2000 acres of private lands in
23 violation of the Arizona Native Plants Act, violating Arizona clean water laws on State
24 Trust Lands and private lands, and negligently causing a disease epidemic that resulted in
25
26

1 the deaths of twenty-one Arizona desert bighorn sheep. *See* Second Amended Complaint.
2 The Court designated the action as complex litigation.

3 **B. The Counterclaim**

4 At the initial Case Management Conference, Johnson's counsel informed the Court
5 of Johnson's intent to file a third-party complaint and a counterclaim. Thereafter, on May
6 13, 2005, the Court entered a Case Management Order providing that "Any Third-Party
7 Complaint(s) of Counterclaim(s) shall be filed by June 17, 2005." On the court-ordered
8 deadline, Johnson filed a third-party complaint against 3-F Contracting, Inc. and Bill
9 Preston Well Drilling. Johnson filed no counterclaim before the deadline.

10 Approximately four months after the deadline, Johnson brought a counterclaim
11 Against Attorney General Terry Goddard (personally), the Attorney General's Office, the
12 Arizona Department of Environmental Quality, and ADEQ Director Stephen Owens
13 (personally). The counterclaim alleges, among other things, that ADEQ took unspecified
14 actions against Johnson Utilities, LLC (an unnamed but affiliated Johnson entity) by
15 subjecting it to "unlawful disparate regulation." (Counterclaim, ¶¶ 47-55.) Johnson also
16 alleges that in December 2003, ADEQ Director Owens made defamatory statements
17 regarding Johnson's environmental violations on the La Osa property and that his
18 statements have been published and republished since then. (*Id.*, ¶¶ 56-61.) Johnson
19 further alleges that Terry Goddard and the Attorney General's Office made defamatory
20 statements in a press release after the State filed this action. (*Id.*, ¶¶ 65-67.) Not one of the
21 Counterdefendants is a party to the principal action.

22 **II. Argument**

23 **A. The Court Should Defer Litigation on the Counterclaim.**

24 Because the counterclaim here does not arise out of the same transaction as the
25 principal case and is not asserted against any of the parties in that case, it is at best a
26

1 permissive counterclaim. *See* Rule 13(b), Ariz. R. Civ. P. Court rules provide for
2 permissive counterclaims, of course, but the rules contemplate some judicial oversight of
3 counterclaims. Rule 13(e) authorizes the presentation of a counterclaim that matured or
4 was acquired after service of a pleading, but only "with the permission of the court." Rule
5 13(e), Ariz. R. Civ. P. That rule should apply to Johnson's counterclaim, which after all is
6 based in part on the Attorney General's press release following the filing of the Complaint
7 in the principal action. (Counterclaim, ¶ 66.) Also, Rule 13(h) provides that additional
8 parties may be joined by way of a counterclaim, subject to the requirements of Rules 19
9 and 20.

10 In sum, the counterclaim here tests the limits of Rule 13. But the procedural
11 questions pale in comparison to the substantive defects (discussed in the Motion to
12 Dismiss). Moreover, because Johnson's counterclaim takes aim at the Attorney General, it
13 should not be litigated simultaneously with the principal case initiated by the Attorney
14 General.

15 **1. Simultaneous Litigation of the Principal Case and the Counter-**
16 **Claim Would Unfairly Prejudice the State by Putting the State's**
17 **Counsel on Trial.**

18 The Court has discretion to stay an action. *Tonnemacher v. Touche Ross & Co.*,
19 186 Ariz. 125, 131, 920 P.2d 5, 11 (App. 1996). The decision whether to stay an action—
20 or part of an action—requires an examination of both practical and policy considerations,
21 such as conserving of judicial resources, limiting the costs of litigation, preventing
22 harassment, and avoiding inconsistent verdicts. *See id.* The circumstances here warrant a
23 stay of discovery on the counterclaim.

24 The principal action here was brought against Johnson by the State. Johnson's
25 counterclaim is directed in large part against Attorney General Terry Goddard—the State's
26 *attorney*. In other words, the counterclaim is an action against *opposing counsel*, and it

1 strikes at the heart of the attorney-client relationship. Allowing the counterclaim to go
2 forward simultaneously with the principal action would interfere with that relationship and
3 violate public policy, especially here because the attorney involved is a constitutional
4 officer.

5 We have found no reported decisions in Arizona addressing whether a litigant may
6 sue opposing counsel during the pendency of a lawsuit in which the attorney is involved.
7 A number of courts from other jurisdictions have disapproved the practice and refused to
8 allow an action against opposing counsel to proceed simultaneously. For example, the
9 court in the *Cohen* case cited the possibility of opposing counsel being deposed as a factor
10 in the decision to stay the action. 94 F. Supp.2d at 1119-20. The court observed that when
11 a party's attorney is being sued, the attorney is subject to deposition and may find it
12 necessary to disclose confidential or privileged information. *Id.* In *Alumet v. Bear Lake*
13 *Grazing Company*, 112 Idaho 441, 732 P.2d 679 (Idaho App. 1986), the defendants in a
14 declaratory judgment action brought a counterclaim and the plaintiff and the plaintiff's
15 attorney for abuse of process and malicious prosecution. The trial court dismissed the
16 counterclaims without prejudice. The Idaho Court of Appeals affirmed and expressed
17 concern that the simultaneous prosecution of the counterclaims against the plaintiff's
18 attorney would require the attorney to withdraw for ethical reasons and that withdrawal
19 would deprive the plaintiff of its choice of counsel and raise the prospect that privileged
20 communications might have to be disclosed. 112 Idaho at 449, 732 P.2d at 687; *see also*
21 *Cohen v. Carreron*, 94 F. Supp.2d 1112, 1119-20 (D. Ore. 2000) (citing possibility of
22 opposing counsel being deposed as factor supporting stay, and noting that when attorney is
23 sued, attorney may find it necessary to disclose confidential or privileged information).

24 In *Kubiak v. Hurr*, 143 Mich. App. 465, 372 N.W.2d 341 (Mich. App. 1985), the
25 plaintiff sued a hospital and a hospital employee. The defendants filed a counterclaim
26

1 against the plaintiff and a complaint against the plaintiff's attorney for defamation based
2 on a prelitigation letter the attorney sent the hospital outlining the basis for the plaintiff's
3 lawsuit. The trial court denied a motion by the plaintiff's attorney to sever the claim
4 against him from the dispute between the plaintiff and defendants, and it granted the
5 defendants' motion to disqualify the plaintiff's attorney on the ground that he was a
6 possible witness. The Michigan Court of Appeals reversed both rulings. The court
7 questioned whether the plaintiff's attorney was a necessary witness in the dispute between
8 the plaintiff and defendants, and it discussed at length the prejudice that attorney
9 disqualification could cause to the client's interest. *Id.* at 471-72, 372 N.W.2d at 344-45.
10 The court noted that the ethical rules were not meant "to permit a lawyer to call opposing
11 counsel as a witness and to thereby disqualify him as counsel," and expressed concern that
12 a motion to disqualify "might be in reality a tactical device to disadvantage" the plaintiff.
13 *Id.* at 471-75, 372 N.W.2d at 344-46. As for the counterclaim and claim against the
14 plaintiff's attorney for defamation, the court found that the attorney was a likely witness.
15 The court said that part of the case should be severed from the rest of the case, and pointed
16 out that the counterclaim and claim against the attorney for defamation would be defeated
17 if plaintiff could prove the truth of the allegations in the underlying case. *Id.* at 477-78,
18 372 N.W.2d at 347-48.

19 Similarly, in *Badger Cab Co. v. Soule*, 171 Wis.2d 754, 492 N.W.2d 375 (Wis.
20 App. 1992), taxicab drivers brought an action against the cab company and its president
21 alleging violations of the Fair Dealership Law. Defendants counterclaimed against the
22 drivers and their counsel, alleging, *inter alia*, intentional interference with contractual
23 relations and abuse of process. The plaintiffs moved to dismiss the counterclaims or
24 alternatively to hold the counterclaims in abeyance until after their claims had been
25 litigated, arguing that "as a matter of law, defendants should be precluded from
26

1 counterclaiming against plaintiffs' counsel for the prosecution of a lawsuit in the
2 underlying lawsuit." The court agreed, stating: (i) "Allowing counterclaims against
3 opposing counsel could create a conflict of interest which would require substitution of
4 counsel;" (ii) "We are concerned that such counterclaims could become potent "dilatory
5 and harassing devices"; (iii) "We are also seriously concerned about the negative effect of
6 these counterclaims on the attorney-client privilege and work product immunity, both
7 critical to effective advocacy"; (iv) "The potential for jury confusion as a result of trying
8 the principal action and counterclaims simultaneously." *Id.* at 760-62, 492 N.W.2d at 378-
9 79.

10 The reasoning of those courts fully applies to this case. Johnson's counterclaim for
11 defamation and false light runs against Attorney General Goddard and the Attorney
12 General's Office—the individual and the office representing the State in the principal case.
13 Allowing the counterclaim to go forward as part of the same proceeding in which the State
14 is prosecuting Johnson would enable Johnson to put the State's lawyers on trial for
15 statements made about the very claims being prosecuted. It would open the door for
16 Johnson to attempt to conduct deposition and written discovery against Goddard and his
17 assistants during the course of the litigation (e.g., on such issues as what they knew and
18 believed at the time the action was filed). This would not only distract trial counsel from
19 prosecuting the litigation, it would force the State's attorneys to choose between defending
20 *themselves* against allegations of defamation (for example by disclosing pre-filing
21 privileged documents and information that may well reflect theories and strategy) and
22 defending *the State* (by not disclosing privileged and confidential information). The
23 prejudice to the State and to the State's attorneys is obvious.

24 The prejudice to the State would be further exacerbated by the fact that the lawyers
25 most knowledgeable about the underlying facts and law would become prospective
26

1 witnesses on the issue of the Attorney General's reasonable belief in the truth of the
2 "defamatory" allegations, and thus may be precluded under the Ethical Rules from serving
3 as advocates at trial. *See* E.R. 3.2 ("A lawyer shall not act as advocate at a trial in which
4 the lawyer is likely to be a necessary witness . . ."). This would be grossly unfair to the
5 State agencies, as the matter has now been going on for *ten months* and five plaintiff
6 agencies are each represented by different counsel, with different specialties.

7 The Attorney General is a constitutional officer. *See* Ariz. Const., Art. 5, § 9. The
8 Attorney General and his assistants may initiate proceedings on behalf of the State and for
9 the protection of the people. *See Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 348
10 P.2d 912 (1960); A.R.S. § 41-192. Johnson's counterclaim against Goddard and the
11 Attorney General's Office threatens to interfere with their ability to carry out their
12 constitutional responsibilities. The counterclaim should be stayed while the Attorney
13 General prosecutes the principal case against Johnson.

14 **2. The Counterclaim may be Rendered Moot by the Determination**
15 **of the Principal Case.**

16 In addition, litigation of the counterclaim may be entirely unnecessary. The
17 counterclaim alleges defamation and false light. (Counterclaim, ¶ 84.) The alleged
18 defamatory comments describe some of the allegations in the State's Complaint. By
19 challenging the press release concerning the lawsuit, for example, Johnson is really
20 objecting to the lawsuit itself. So while Johnson complains of defamation, the essence of
21 the counterclaim is for malicious prosecution, or wrongful initiation of civil proceedings.
22 Johnson doesn't call it that, probably because a cause of action for wrongful civil
23 proceedings cannot be maintained at the same time as the proceedings being challenged.
24 A litigant claiming wrongful civil proceedings must show there was a favorable
25 termination of the proceedings. *See Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 939
26 P.2d 430 (App. 1997); *Heck v. Humphrey*, 512 U.S. 477 (1994) (to maintain section 1983

1 action alleging malicious prosecution, "plaintiff must prove that the conviction or sentence
2 has been reversed on direct appeal, expunged by executive order, declared invalid by a
3 state tribunal authorized to make such determination, or called into question by a federal
4 court's issuance of a writ of habeas corpus"). Johnson is attempting an end run around the
5 "termination" requirement.

6 In *Cohen v. Carreon*, 94 F. Supp.2d 1112 (D. Ore. 2000), the owner of an Internet
7 domain name filed suit against a user who was attempting to register the name and convert
8 it to his own use. The user filed a counterclaim against the owner for defamation. The
9 user then filed a second action against the owner and the owner's attorney, once again
10 alleging defamation (and other things). The court in the second action noted that although
11 the parties were not identical, the two defamation claims were similar in that both turned
12 on the ownership of the domain name. Given the similarity, the court found that the claims
13 in the second action might be decided or substantially narrowed by the outcome of the first
14 action. The court also found that litigating the two actions simultaneously would impose a
15 real burden on the owner, while staying the second action would not harm the user.
16 Consequently, the court in the second action granted a stay. *Id.* at 1116-1120.

17 These factors also weigh in favor of staying the counterclaim here. As noted above,
18 the counterclaim alleges defamation based on statements attributed to Owens and Goddard
19 that merely reflect some of the allegations in the State's Complaint against Johnson. Truth
20 is a defense to defamation. *See Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 355, 819
21 P.2d 939, 941 (1991). If the State proves its allegations in the principal case, the truth of
22 those allegations will be established. The principal case is therefore likely to be
23 dispositive of the counterclaim. For that reason alone, the Court should stay further
24 litigation of the counterclaim until there is a determination of the principal case.
25
26

1 **B. The Principal Action and the Counterclaim Should be Bifurcated and**
2 **Tried Separately so as to Avoid Confusion and Prejudice.**

3 The Court, "in furtherance of convenience or to avoid prejudice, or when separate
4 trials will be conducive to expedition and economy, may order a separate trial of any . . .
5 counterclaim. . . ." Rule 42(b), Ariz. R. Civ. P. The Court has broad discretion in deciding
6 whether to order separate trials. *Morley v. Superior Court*, 131 Ariz. 85, 87, 638 P.2d
7 1331, 1333 (1981); *see also Williams v. Thude*, 180 Ariz. 531, 534, 885 P.2d 1096, 1099
8 (App. 1994) (approving separate trials and liability and damages where evidence on the
9 two was unrelated and proof of plaintiff's catastrophic injuries held potential to influence
10 jury's consideration of liability issues); *Tankersley v. Superior Court*, 146 Ariz. 402, 405,
11 706 P.2d 728, 731 (App. 1985) (finding that trial court abused discretion in not ordering
12 separate trial on counterclaim that was potentially determinative of parties' rights and
13 remedies); *Anderson Aviation Sales Co., Inc. v. Perez*, 19 Ariz. App. 422, 430, 508 P.2d
14 87, 95 (App. 1973) (affirming order granting separate trial on cross-claim).

15 Here, prejudice to the parties could best be avoided by staying the counterclaim
16 throughout the litigation. The legal issues in the two are entirely different, and the factual
17 overlap is actually quite limited. As explained above, the State's attorneys are not
18 witnesses in the principal case. But if Johnson's counterclaim goes forward, they will be
19 witnesses, and it would be prejudicial to the State to have its attorneys on trial while they
20 are prosecuting a complex case. Staying the counterclaim and separating it from the
21 principal case would avoid this prejudice. Combining unrelated matters would also
22 confuse a jury. An order staying the counterclaim would make the litigation more
23 manageable for everyone involved. Additionally, it would promote judicial efficiency by
24 streamlining the proceedings and avoiding the risk of unnecessary and unwarranted
25 litigation.
26

1 **III. Conclusion**

2 Johnson's counterclaim injects new factual and legal issues as well as new parties
3 into this complex case, including most notably a claim against Attorney General Goddard,
4 who is responsible for prosecuting the State's action against Johnson. Allowing the
5 counterclaim to be litigated simultaneously would cause severe prejudice to the State in the
6 principal action and to the Counterdefendants in the counterclaim. If the counterclaim is
7 permitted to proceed at all, it and the principal action should be bifurcated and discovery
8 on the counterclaim should be stayed pending a determination of the principal action.

9 **RESPECTFULLY SUBMITTED** this 16 December 2005.

10
11 Terry Goddard
Attorney General

12 By /s/ Michael K. Goodwin
13 Michael K. Goodwin
14 Lisa K. Hudson
15 Michael G. Walker
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17 Original and copies of the foregoing e-filed
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ARIZONA SUPERIOR COURT
MARICOPA COUNTY

STATE OF ARIZONA, et al.,

Plaintiffs,

v.

GEORGE H. JOHNSON and JANA S.
JOHNSON, husband and wife, et al.,

Defendants.

Case No: CV 2005-002692

MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

(Non-Classified Civil-Complex)

(Assigned to the Honorable Janet Barton)

(Oral Argument Requested)

GEORGE H. JOHNSON, et al.,

Counterclaimants,

v.

ARIZONA DEPARTMENT OF
ENVIRONMENTAL QUALITY, et al.,

Counterdefendants.

Johnson's Counterclaim seeks to punish public officials for informing the public about their efforts to protect Arizona's biological, ecological, and cultural heritage.

1 Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., the Counterdefendants Arizona Department of
2 Environmental Quality ("ADEQ"), Stephen and Karen Owens, Office of the Arizona
3 Attorney General ("AGO") and Terry and Monica Goddard move to dismiss the
4 Counterclaim filed by George Johnson and Johnson International ("Johnson").
5 Alternatively, the Counterclaimants have filed an Alternative Motion to Stay and
6 Bifurcate Discovery.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 In reviewing a motion to dismiss for failure to state a claim, "well-pleaded
9 material allegations of the Complaint are taken as admitted, but conclusions of law or
10 unwarranted deductions of fact are not." *Aldabbagh v. Arizona Dep't of Liquor Licenses*
11 *and Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

12 **I. The Attorney General's Statements Are Absolutely Privileged.**

13 The Counterclaim personally names the Attorney General, his spouse, and the
14 AGO, based on statements made in a Press Release issued in February 2005, after the
15 State filed this action. [Counterclaim at ¶¶ 65-66.] Johnson claims some statements in
16 that release were intended to damage his reputation and to place him in "a false light."
17 [Id. at ¶¶ 67-69.] While the Attorney General and the Attorney General's Office stand
18 behind the truth of each of these statements, all claims based on any statement alleged to
19 be made by the Attorney General should be dismissed on the grounds that they are
20 covered by the executive officer privilege, which provides that a "superior executive
21 officer" such a Governor or an Attorney General has an "absolute privilege to publish
22 defamatory matter concerning another in communications made in the performance of his
23 official duties." *Restatement (Second) Torts* § 591(b) (hereinafter, "the *Restatement*")
24 (emphasis added). The superior executive officer privilege is equally applicable in
claims for "false light" invasion of privacy. See *Restatement* § 652F (absolute
privileges).

1 The superior executive officer privilege supports the strong public interest in
2 allowing high executive officers to inform the public on important matters, unfettered by
3 the fear that they may be sued for defamation or similar torts:

4 Complete freedom in performing the duties of the important executive
5 offices of the State requires the absolute privilege to publish
6 defamatory matter of others when the publications are incidental to the
7 performance of the duties of the office. The public welfare is so far
8 dependent upon a reasonable latitude of discretion in the exercise of
functions of high executive offices that their incumbents may not be
hindered by the possibility of a civil action for defamation in connection
therewith.

9 *Restatement* § 591, comment a. See also *Barr v. Matteo*, 360 U.S. 564, 371 (1959)
10 (“Officials of government should be free to exercise their duties unembarrassed by the
11 fear of damage suits in respect of acts done in the course of those duties--suits which
12 would consume time and energies which would otherwise be devoted to governmental
13 service”).

14 As noted in the *Restatement*, “all of the State courts that have considered the
15 question have agreed that the absolute privilege stated in Section 591(b) protects at least
16 the governor [and] the attorney general” *Id.* at comment c (emphasis added). While
17 the privilege is limited to defamations published “in the performance of [the officer’s]
18 official duties, or within the scope of [the] line of duty,” it is clear that the protection
19 extends to publication of press releases concerning the activities of the official or the
office:

20 The head of a federal or state department may be authorized to issue press
21 releases giving the public information concerning the conduct of the
22 department, or events of public interest that have occurred in connection
23 with it; and if he is so authorized he is within the scope of his official duties
24 when he gives the information to the press.

1 *Id.* at comment f (emphasis added). *See also People v. Knecht Services, Inc.*, 575 N.E.2d
2 1378 (Ill. Ct. App. 1991) (Attorney General absolutely immune from allegedly libelous
3 statements contained in a press release relating to a consumer fraud lawsuit filed by the
4 Attorney General's Office); *Kilgore v. Younger*, 180 Cal. Rptr. 657, 664, 640 P.2d 793,
5 800 (1982) (Attorney General entitled to absolute immunity to "avoid the 'chilling effect'
6 which the fear of damage suits would have on the energetic performance of the public's
7 business"); *Little v. Spaeth*, 394 N.W.2d 700, 706 (N.D.1986) (Attorney General's
8 remarks to press about a lawsuit filed against the office were absolutely privileged); *Gold*
9 *Seal Chinchillas, Inc. v. State*, 69 Wash.2d 828, 833, 420 P.2d 698, 701 (1966) (Attorney
10 General absolutely privileged in the issuance of press release concerning the initiation of
11 litigation); *Morton v. Hartigan*, 145 Ill.App.3d 417, 424-425, 495 N.E.2d 1159, 1164-65
12 (1986) (Attorney General absolutely immune from claim by terminated assistant based on
13 alleged defamatory remarks); *Hultman v. Blumenthal*, 67 Conn. App. 613, 787 A.2d 666
14 (2002) (alleged defamatory statements made by attorney general in press release were
subject to sovereign immunity).

15 *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986) does not specifically
16 address the Restatement's application to superior executive officers such as the Governor
17 and Attorney General. The court declined to apply Section 591(b) to defamatory
18 statements published by the Director of the Department of Health Services. The court
19 recognized that "there may be some government offices that require absolute immunity,"
20 151 Ariz. at 558, 729 P.2d at 912, (emphasis added), but it concluded that in the case
21 before it, the negative aspects of suits against public officials could be minimized if
22 plaintiffs, instead of merely alleging subjective malice, are required to establish proof of
objective malice." 151 Ariz. at 558, 729 P.2d at 913.

23 The Attorney General requires absolute immunity to avoid the effects of
24 embroiling his office in defamation litigation. The very act of permitting defamation

1 claims to be brought against the Attorney General would have profound effects on his
2 ability to represent the State, particularly where the alleged defamation arises out of the
3 prosecution of important civil and criminal actions. Not only is informing the public
4 about such actions a vital function of the office, the very act of doing so is particularly
5 likely to spur defamation claims. As one court held: “[i]t is the function and
6 responsibility of the Attorney General to bring consumer fraud actions. As such, he must
7 be allowed to keep the public informed of his actions without fear of personal liability.
8 Educating and informing the public is just as much a part of the Attorney General’s
9 function as prosecuting fraudulent and deceptive practices.” *People v. Knecht Services*,
10 575 N.E.2d at 1391.

11 We do not suggest that the superior executive officer privilege should protect
12 every assistant attorney general who speaks to the press about his or her case. *See State*
13 *v. Superior Court*, 186 Ariz. 294, 921 P.2d 697 (App. 1996) (assistant attorneys general
14 retain qualified privilege). However, in the case of the Attorney General, the policy
15 considerations that underlie the superior executive officer privilege are very different and
16 cannot be adequately served by applying a “qualified” privilege that forces the office to
17 defend litigation on the merits each time that a defamation lawsuit is filed. The public
18 has a strong interest in not having the Attorney General’s speech chilled by fear of having
19 the office become embroiled in litigation. The public has a strong interest in having
20 privileged investigatory matters kept privileged. If such officials cannot keep the public
21 informed on law enforcement actions taken by their agencies without fear of being sued
22 personally for defamation (as Johnson has done in this case), the public’s right to know
23 would be seriously impeded.

24 The Counterdefendants thus urge the Court to dismiss all claims against the AGO
and the Goddards.

1 **II. Counterclaimants' Defamation and False Light Claims Against ADEQ,**
2 **Director Owens and his Spouse Must Be Dismissed.**

3 The Counterclaim alleges that "in or about December 2003," ADEQ Director
4 Owens made the following statements to the press which Counterclaimants maintain are
5 "defamatory" and place them in a "false light":
6

- 7 • "Johnson International seems to be deliberately choosing not to comply
8 with State environmental laws."
- 9 • "Johnson International is a large sophisticated outfit that obviously has had
10 experience with environmental laws and had violated them on numerous
11 occasions in the past."
- 12 • "It [Johnson's claim that it was involved in agriculture on the Ranches]
13 doesn't really pass the laugh test."

14 [Counterclaim, ¶¶ 56, 59]. These claims, too, fail as a matter of law.

15 **A. Counterclaimants' Defamation And "False Light" Claims Are Time**
16 **Barred.**

17 To the extent that the above statements were made "in or about December 2003,"
18 all claims based thereon are time barred. Arizona's claim statute requires all persons
19 having claims against a public entity or public employee to file such claims within one
20 hundred eighty days after the cause of action accrues. A.R.S. § 12-821.01. Similarly,
21 "all actions against any public entity or public employee shall be brought within one year
22 after the cause of action accrues and not afterwards." A.R.S. § 12-821. Counterclaimants
23 did not even serve their notice of claim until on or about April 28, 2005, ten months too
24 late. And they did not file this Counterclaim until October 2005, nearly two years after
their alleged claims accrued. As such, all claims based upon any purported statements
made prior to October 29, 2004 are time barred and should be dismissed.

1 **B. Counterclaimants Fail to Establish a Defamation Claim.**

2 Although Counterclaimants allege that the offending comments were re-published
3 as late as April 2005 [Counterclaim ¶ 62.], the defamation claim still fails because the
4 alleged statements are not defamatory. To pursue their defamation claim against Director
5 Owens, Counterclaimants must prove that (i) his alleged comments could be reasonably
6 interpreted as stating actual facts about the Johnsons and (ii) that the statements were
7 false. *Turner v. Devlin*, 174 Ariz. 201, 204, 848 P.2d 286, 289 (1993). Statements which
8 can be interpreted as “rhetorical political invective, opinion, or hyperbole are protected
9 speech.” *Burns v. Davis*, 196 Ariz. 155, 165, 993 P.2d 1119, 1129 (App. 1999) (citation
10 omitted).

11 Here, two of the three statements attributed to Director Owens do not arguably
12 state an “actual fact.” In *Turner*, a police officer asserted a defamation claim against a
13 school nurse who complained about his interview of an injured youth, claiming the
14 officer “demanded that the student stand against the wall”, “was interrogated as if he, the
15 victim, had committed an illegal act” and that the “officer was rude and disrespectful, and
16 his manner bordered on police brutality.” 174 Ariz. at 209, 848 P.2d at 294. In finding
17 the communication could not have been interpreted as stating facts, the court found the
18 equivocal use of the words “manner,” “as if” and “bordered,” as not implying actual
19 facts, but referring to imprecise characterizations, the intent of which was clear to the
20 reader. *Id.* 174 Ariz. at 208, 848 P.2d at 293.

21 Mr. Owens’ alleged statements that Johnson International “seems to be
22 deliberately choosing not to comply with State environmental laws” and “[i]t doesn’t
23 really pass the laugh test,” are non-actionable hyperbolic and opinion speech. Neither
24 statement asserts or implies any facts, only opinions and observations which question
assertions and actions of the Counterclaimants.

1 Second, statements "regarding matters of public concern must be provable as false
2 before a defamation action can lie" a burden which is on the Counterclaimants. *Turner*,
3 174 Ariz. at 205, 848 P.2d at 290 (citation omitted). In determining whether the speech
4 at issue addresses a matter of public concern, courts look at the statements' content, form
5 and context as revealed by the record. *Id.* Director Owens' purported comments
6 addressing Counterclaimants' non-compliance with state environmental laws
7 unquestionably address a matter of public concern.

8 When analyzing whether Counterclaimants can prove the falsity of the speech, the
9 illustration in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) is instructive:

10 [U]nlike the statement, "In my opinion Mayor Jones is a liar," the
11 statement, "In my opinion Mayor Jones shows his abysmal ignorance by
12 accepting the teachings of Marx and Lenin" would not be actionable. ...
13 [A] statement of opinion relating to matters of public concern which does
14 not contain a provably false connotation will receive full constitutional
15 protection.

16 *Id.* at 19-20. Director Owens' subjective assessments of Counterclaimants' actions
17 cannot be proven false. There is no empirical standard or objective basis upon which any
18 fact finder could determine whether Counterclaimant Johnson's statements about his
19 purported ranching activities could "pass the laugh test." *Turner*, 174 Ariz. at 207, 848
20 P.2d at 292. Similarly, the comment whether Johnson International "seems to be" acting
21 "deliberately" reflects Director Owens' subjective impression; the truth of which cannot
22 be assessed under an evidentiary standard. *Id.* (finding subjective impressions of
23 plaintiff's manner contained no factual connotations which were provable.)

24 **C. Director Owens Is Immune From The Defamation And False Light
Claims.**

In any event, the circumstances and content of the statements attributed to Director
Owens fall squarely within the "qualified immunity" of his position as the ADEQ
Director.

1 In *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986), the Arizona
2 Supreme Court adopted the doctrine of qualified immunity for common law torts against
3 some public officials, such as agency directors. All suits against public officials exact a
4 high cost because such suits take officials away from doing their jobs. Therefore, state
5 officials, such as agency directors, are qualifiedly immune from common law tort claims
6 when they act within their discretionary authority, i.e., when they set policy or perform an
7 act that inherently requires the exercise of their judgment or discretion. *Id.*, 151 Ariz. at
8 555, 729 P.2d at 909; A.R.S. § 41-621. The immunity is lost if the official acts outside of
9 the "outer perimeter" of his or her required or discretionary functions, or if the official
10 acts in objective bad faith. *Id.*, at 560, 729 P.2d at 914. Thus, if Director Owens could
11 have reasonably believed, based upon the information known to him, that the statement in
12 question was substantially true and that the publication was an appropriate means of
13 serving the public, he is entitled to qualified immunity. *Id.*, at 559, 729 P.2d at 913.

14 Director Owens' alleged statements pertaining to Counterclaimants Johnson or
15 Johnson International are supported by the historical record of the ADEQ's involvement
16 with the Johnson parties (which includes events preceding Director Owens' January 2003
17 appointment), and the factual investigation which ultimately gave rise to the underlying
18 lawsuit. (Exh. 1.)¹ That the Johnson parties ADEQ cited operated under various names
19 does not invalidate the accuracy of Director Owens' statements. Each cited entity traces
20 directly to George Johnson. (Exh. 2.) See *Read v. Phoenix Newspapers, Inc.*, 169 Ariz.
21 353, 819 P.2d 939 (1991) (acknowledging "slight inaccuracies will not prevent a
22 statement from being true in substance as long as the 'gist' or 'sting' of the publication is
23 justified.")

24 ¹ The Court may take judicial notice of the ADEQ documents, court records and the
Arizona Corporation Commission records. See *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d
617 (1952); *Application of Oppenheimer*, 95 Ariz. 292, 389 P.2d 696 (1964);
Ariz.R.Evid. 201.

1 Director Owens' comments pertain to environmental law compliance; an area fully
2 within the domain of Director Owens' official job duties and ADEQ Director. *See e.g.*
3 A.R.S. 49-261 (recognizing Director has authority to issue orders of compliance for water
4 quality statute enforcement). As such, he is entitled to immunity. More, even assuming
5 Counterclaimants disputed the allegations in the notices of violation and the evidence in
6 the record would allow a different conclusion than the one reached by ADEQ, Director
7 Owens would still be entitled to immunity. *Carroll v. Robinson*, 178 Ariz. 453, 457-58,
8 874 P.2d 1010, 1014-15 (App. 1994) (stating that even though defendants could have
9 come to different conclusion than one reached in light of known information was
insufficient to overcome qualified immunity).

10 **F. Counterclaimants' False Light Invasion of Privacy Claim Must Be**
11 **Dismissed.**

12 In addition to being time barred and subject to qualified immunity protections,
13 Counterclaimants' False Light Invasion of Privacy Claim must be dismissed because a
14 corporation may not pursue an invasion of privacy claim, and because they have not
15 asserted any allegations which, if proven true, would substantiate such a claim.

16 **1. A corporation may not pursue a false light claim.**

17 A corporation may not assert an invasion of privacy claim. *Medical Laboratory*
18 *Management Consultants v. American Broadcasting Companies, Inc.*, 931 F.Supp. 1487,
19 1493 (D.Ariz. 1996). Johnson International is a corporation. [Counterclaim, ¶ 2.] Its
20 false light claim must be dismissed. This argument would also apply to the false light
21 claims against Goddard and AGO.
22
23
24

1 2. **Regardless of how the purported comment about**
2 **counterclaimant Johnson is perceived, it would not support a**
3 **false light claim.**

4 Counterclaimant Johnson's false light claim is based upon Director Owens
5 allegedly stating to the press that Johnson's contention he was involved in agriculture on
6 the land in question rather than planning to use it for residential and commercial
7 development "would not pass the laugh test." [Counterclaim, ¶ 56.]

8 To sustain a false light claim, the Counterclaimant must prove Director Owens
9 knowingly or recklessly published false information or innuendo which a reasonable
10 person would find highly offensive. *Id.* at 340, 783 P.2d at 786. No reasonable person
11 would find a statement that someone was commercially developing land rather than using
12 land for agricultural purposes "highly offensive."

13 Finally, false light torts are intended to redress emotional injury. *Godbehere v.*
14 *Phoenix Newspapers, Inc.* 162 Ariz. 335, 341, 782 P.2d 781, 787 (1989).
15 Counterclaimant does not claim any emotional injury; only injury to his reputation.
16 [Counterclaim, ¶ 58, 64, 81.] But false light claims do not protect a person's reputation.
17 *Id.* As Counterclaimant Johnson is not seeking any relief which an invasion of privacy
18 tort is intended to redress, his false light claim should be dismissed.

19 **III. The Counterclaim Fails To State A Claim On Behalf Of Johnson Utilities.**

20 It is not at all clear whether the Counterclaimants are seeking damages for alleged
21 wrongdoing with respect to Johnson Utilities. To the extent it does, however, the Court
22 should dismiss those claims. Johnson Utilities, L.L.C. is not a defendant or a
23 counterclaimant in this case and the Counterclaim seeks no relief on its behalf.
24 [Counterclaim at ¶¶ 12-13.] Nevertheless, paragraphs 47-54 allege that ADEQ (i) took
unspecified actions against Johnson Utilities that "were not supported by law or
regulations of the ADEQ" [¶ 49], (ii) applied "disparate standards . . . not applicable to

1 other utilities [¶ 50], (iii) “unlawfully imposed burdens and procedures . . . not applicable
2 to other utilities” [¶ 50], (iv) applied “hidden” rules . . . and otherwise required disparate
3 capacity requirements and standards of Johnson Utilities” [¶ 51], (v) “expressed a
4 generally hostile attitude toward Johnson Utilities, its principals, owners and managers”
5 [¶ 52], (vi) “intentionally and knowingly singled out Johnson Utilities and its owners and
6 managers for increased unlawful disparate regulation” [¶ 52], and (vii) when Johnson
7 “resisted ADEQ’s unlawful and illegal application of policies and procedures to Johnson
8 Utilities” [¶ 53], “ADEQ and other governmental agencies have retaliated against the
9 principals of Johnson Utilities and its related entities” [¶ 54] These allegations are
10 irrelevant to the underlying action.

11 The Court should also dismiss any attempted claims asserted on behalf of Johnson
12 Utilities, because the facts underlying those claims are already the subject of another case
13 pending before this court, *Johnson Utilities L.L.C., dba Johnson Utilities Company*,
14 Maricopa County Superior Court Case No. CV 2004-022074. As alleged in that action,
15 ADEQ’s actions with respect to Johnson Utilities in Pinal County are completely
16 unrelated to the La Osa Ranch property which is the subject of this litigation. Johnson
17 Utilities complains that ADEQ applied policies and practices which exceeded its
18 authority and were “arbitrary, capricious, and otherwise unlawful.” (Exhibit 3, First
19 Amended Complaint at ¶ 24.) Such claims are the same as those now asserted in this
20 Counterclaim. Because Johnson Utilities’ claims are already pending in another case in
21 which the company is a party, they are not properly raised in this case, where Johnson
22 Utilities is not a party.

23 **IV. The Claim for “Selective and Arbitrary Enforcement” is Barred by** 24 **Prosecutorial Immunity.**

Beginning with paragraph 73, the Counterclaim argues that “the defamatory
actions, statements, and trespasses made against Johnson were and are part of a larger

1 scheme of selective and arbitrary enforcement, which has been perpetrated for several
2 years and continues to this day.” Counterclaimants allege the existence of a “scheme”
3 based on their contention that the main action sues the wrong parties.

4 The allegation that the State sued Defendants rather than others is nothing more
5 than a back door attempt to assert a “wrongful institution of civil proceedings” claim (aka
6 “malicious prosecution”). Absolute prosecutorial immunity, which applies to civil
7 enforcement proceedings and criminal prosecutions, bars this claim. *See State v.*
8 *Superior Court*, 186 Ariz. 294, 297, 921 P.2d 697, 700 (App. 1996). Even if the Plaintiff
9 could assert a malicious prosecution claim, it cannot be asserted unless and until the
10 plaintiff prevails in the underlying action. *See Glaze v. Larsen*, 207 Ariz. 26, 29 83 P.3d
26, 29 (2004). The Counterclaim should therefore be dismissed on either ground.

11 **V. Conclusion.**

12 Based on the foregoing, the Counterdefendants move to dismiss the Counterclaim
13 in its entirety.

14 RESPECTFULLY SUBMITTED this 16th day of December, 2005.

15
16 Terry Goddard
Attorney General

17
18 By /s/ Lisa K. Hudson
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21
22
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24 LexisNexis File and Serve
This 16th day of December 2005, to:

1 The Honorable Rebecca A. Albrecht
101 West Jefferson Street, ECB 411
2 Phoenix, Arizona 85003

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4 COPIES of the foregoing served via LexisNexis File
and Serve this 16th day of December 2005, to:

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12 L.L.C.; General Hunt Properties, Inc.; Atlas
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22 Bill Preston Well Drilling

23 By: /s/ Maureen Riordan-Agahi
24 Secretary to Lisa Hudson

EXHIBIT 2

Arizona Corporation Commission
State of Arizona Public Access System

12/13/2005 11:52 AM

Corporate Inquiry	
File Number: L-0809733-4	
Corp. Name: JOHNSON UTILITIES, L.L.C.	

Domestic Address

5230 E SHEA BLVD #200
SCOTTSDALE, AZ 85254

Statutory Agent Information

Agent Name: GARY A DRUMMOND
Agent Mailing/Physical Address:
2525 E ARIZONA BILTMORE CIR
#117
PHOENIX, AZ 85016
Agent Status: APPOINTED 12/14/2001
Agent Last Updated: 12/26/2001

Officer and Director Information

Name:	JANA S JOHNSON
Title:	MEMBER

Address:	5320 E SHEA BLVD
	SCOTTSDALE, AZ 85254
Date Assigned: 06/05/1997	Last Updated: 06/18/1997
Name:	GEORGE H JOHNSON
Title:	MEMBER
Address:	5320 E SHEA BLVD
	SCOTTSDALE, AZ 85254
Date Assigned: 06/05/1997	Last Updated: 06/18/1997
Name:	THE GEORGE H JOHNSON REV TRUST
Title:	MEMBER
Address:	5320 E SHEA BLVD
	SCOTTSDALE, AZ 85254
Date Assigned: 12/30/1997	Last Updated: 03/02/1998

Additional Corporate Information

	Corporation Type: DOMESTIC L.L.C.
Incorporation Date: 06/05/1997	Corporate Life Period:
Domicile: ARIZONA	County: MARICOPA
Approval Date: 06/05/1997	Original Publish Date: 08/12/1997
Business Type: UNKNOWN	

Annual Reports

No Annual Reports on File

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Document Number	Description	Date Received
002-1608	AGENT APPOINTMENT/CORP ADDR CHG	12/14/2001

Amendments

Amendment Date	Amendment Type	Publish Date	Publish Exception
12/30/1997	AMENDMENT	02/23/1998	WAIVE

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Location	Date Received	Description
1-1129-022-034	06/05/1997	ARTICLES OF ORGANIZATION
2-0211-050-052	08/12/1997	PUBLICATION OF ARTICLES OF ORGANIZATION
2-0213-025-037	08/18/1997	PUB OF LLC/FILM ONLY
1-1204-011-032	12/30/1997	AMENDED & RESTATED ARTICLES
2-0219-073-020	02/23/1998	PUB OF AMENDED/RESTATED ARTICLES
3-1644-002-389	12/14/2001	AGENT APPOINTMENT/CORP ADDR CHG

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Corporate Inquiry**File Number: -0192669-0****Corp. Name: JOHNSON INTERNATIONAL, INC.****Domestic Address**

5230 E SHEA BLVD #200

SCOTTSDALE, AZ 85254

Statutory Agent Information**Agent Name: GARY A DRUMMOND****Agent Mailing/Physical Address:**

2525 E ARIZ BILTMORE CIR #117

PHOENIX, AZ 85016

Agent Status: APPOINTED 12/14/2001**Agent Last Updated: 12/14/2004****Officer and Director Information****Name:** GEORGE H JOHNSON**Title:** PRESIDENT**Address:** 5230 E SHEA BLVD #200

	SCOTTSDALE, AZ 85254
Date Assigned: 04/18/1989	Last Updated: 12/14/2004
Name:	JANA S JOHNSON
Title:	SECRETARY
Address:	5230 E SHEA BLVD #200
	SCOTTSDALE, AZ 85254
Date Assigned: 04/18/1989	Last Updated: 12/14/2004

Additional Corporate Information

	Corporation Type: PROFIT
Incorporation Date: 01/28/1987	Corporate Life Period: PERPETUAL
Domicile: ARIZONA	County: MARICOPA
Approval Date: 02/12/1987	Original Publish Date: 03/30/1987
Business Type: REAL ESTATE	

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File Year	File Month	Date Received	Reason Returned	Date Returned	Extension
2004	12	11/02/2004			
2003	12	10/17/2003			

2002	12	07/18/2003			
2001	12	12/10/2001			06/28/2003
2000	12	03/01/2001			
1999	12	10/15/1999			
1998	12	04/28/1999			
1997	12	06/05/1998			
1996	12	08/22/1997			
1995	12	07/16/1996			
1994	12	04/15/1995			10/15/1996
1993	12	03/31/1994			
1992	12	04/15/1993			
1991	12	04/22/1992			
1990	12	04/15/1991			06/15/1992
1989	12	04/16/1990			
1988	12	06/09/1989			
1987	12	03/07/1988			

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Document Number	Description	Date Received
 95	95 ANNUAL REPORT	07/16/1996
 96	96 ANNUAL REPORT	08/22/1997
 97	97 ANNUAL REPORT	06/05/1998
 98	98 ANNUAL REPORT	04/28/1999
 99	99 ANNUAL REPORT	10/15/1999
 00	00 ANNUAL REPORT	03/01/2001
 01	01 ANNUAL REPORT	12/10/2001
 00416088	AGENT APPOINTMENT/CORP ADDR CHG	12/14/2001

0075-1886	02 ANNUAL REPORT	07/18/2003
00805-148	03 ANNUAL REPORT	10/17/2003
010-144	04 ANNUAL REPORT	11/02/2004

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Location	Date Received	Description
1-0278-011-004	01/28/1987	ARTICLES
2-0052-060-004	03/30/1987	PUBLICATION OF ARTICLES
1-0364-005-018	03/07/1988	87 ANNUAL REPORT
1-0478-029-010	06/09/1989	88 ANNUAL REPORT
1-0533-023-047	04/16/1990	89 ANNUAL REPORT
2-0100-069-010	07/16/1990	CORPORATION ADDRESS CHANGE
1-0611-008-042	04/15/1991	90 ANNUAL REPORT
2-0125-046-050	04/14/1992	91 EXTENSION
1-0689-031-002	04/22/1992	91 ANNUAL REPORT
1-0774-013-016	04/15/1993	92 ANNUAL REPORT
1-0861-025-035	03/31/1994	93 ANNUAL REPORT
1-0955-015-033	04/15/1995	94 ANNUAL REPORT
2-0187-		

037-021	04/16/1996	95 EXTENSION
1-1091-012-018	07/16/1996	95 ANNUAL REPORT
1-1161-026-011	04/15/1997	96 ANNUAL REPORT
1-1128-008-031	05/21/1997	AGENT APPOINTMENT/CORP ADDR CHG
1-1238-020-021	10/21/1997	97 ANNUAL REPORT
3-1546-001-479	04/28/1999	98 ANNUAL REPORT
3-1553-000-272	10/15/1999	99 ANNUAL REPORT
3-1609-000-767	03/01/2001	00 ANNUAL REPORT
3-1643-002-916	12/10/2001	01 ANNUAL REPORT
3-1644-002-397	12/14/2001	AGENT APPOINTMENT/CORP ADDR CHG
1-1581-032-010	12/26/2002	2002 EXTENSION
3-1741-002-431	07/18/2003	02 ANNUAL REPORT
3-1766-000-188	10/17/2003	03 ANNUAL REPORT

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Corporate Inquiry	
File Number: L-0993688-0	Corporate Status:
Corp. Name: THE RANCH AT SOUTH FORK, L.L.C.	

Domestic Address

5230 E SHEA BLVD #200
SCOTTSDALE, AZ 85254

Statutory Agent Information

Agent Name: GARY A DRUMMOND
Agent Mailing/Physical Address:
2525 E ARIZONA BILTMORE CIR
#117
PHOENIX, AZ 85016
Agent Status: APPOINTED 06/25/2001
Agent Last Updated:

Officer and Director Information

Name:	GEORGE H JOHNSON
Title:	MANAGER

Address:	5230 E SHEA BLVD #200
	SCOTTSDALE, AZ 85254
Date Assigned: 06/25/2001	Last Updated: 06/29/2001
Name:	GEORGE H JOHNSON REVO TRUST
Title:	MEMBER
Address:	GEORGE H JOHNSON (TRUSTEE)
	JANA S JOHNSON (TRUSTEE)
	5230 E SHEA BLVD #200
	SCOTTSDALE, AZ 85254
Date Assigned: 06/25/2001	Last Updated: 06/29/2001

Additional Corporate Information

	Corporation Type: DOMESTIC L.L.C.
Incorporation Date: 06/25/2001	Corporate Life Period: PERPETUAL
Domicile: ARIZONA	County: MARICOPA
Approval Date: 06/25/2001	Original Publish Date: 07/31/2001

Annual Reports

No Annual Reports on File

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Document Number	Description	Date Received
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Microfilm

Location	Date Received	Description
1-1469-008-005	06/25/2001	ARTICLES OF ORGANIZATION
2-0284-020-044	07/31/2001	PUBLICATION OF ARTICLES OF ORGANIZATION
2-0284-033-007	08/07/2001	PUBLICATION OF ARTICLES OF ORGANIZATION

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EXHIBIT 3

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J. CALHOON
DEPUTY CLERK

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Jay L. Shapiro (No. 014650)
Dawn Meidinger (No. 017373)
3003 North Central Avenue
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Phoenix, Arizona 85012-2913
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Email: jshapiro@fclaw.com

Attorneys for Plaintiff
Johnson Utilities L.L.C. dba
Johnson Utilities Company

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JOHNSON UTILITIES L.L.C., dba
JOHNSON UTILITIES COMPANY,

Plaintiff,

v.

STEPHEN A. OWENS, DIRECTOR,
ARIZONA, DEPARTMENT OF
ENVIRONMENTAL QUALITY; STATE
OF ARIZONA

Defendants.

Case No. CV 2004 - 022074

FIRST AMENDED COMPLAINT

(Declaratory Judgment and Injunction)

(Assigned to the Honorable Rebecca A.
Albrecht)

Plaintiff Johnson Utilities L.L.C., an Arizona public service corporation, ("JUC"),
hereby alleges as follows:

NATURE OF THE ACTION

1. This action requests declaratory and injunctive relief pursuant to A.R.S.
§ 41-1034, §§ 12-1801 *et seq.*, and §§ 12-1831, *et seq.*

2. As described herein, Stephen A. Owens, director of the Arizona Department
of Environmental Quality ("ADEQ"), and the defendant State of Arizona (collectively

1 "Owens"), have adopted certain policies and practices related to the regulation of
2 wastewater treatment plants.

3 3. These policies and practices constitute de facto rules because they: (a) are
4 allegedly of general applicability; (b) implement, interpret and/or prescribe law, policy, or
5 procedure; and (c) impose additional regulatory requirements on JUC and other regulated
6 persons.

7 4. These policies and practices were adopted without meeting the notice,
8 comment and publication requirements of Arizona's Administrative Procedure Act,
9 A.R.S. § 41-1001, *et seq.*

10 5. Owens' actions taken in accordance with these policies and practices are
11 beyond Owens' authority as provided by statute and regulation, and are arbitrary,
12 capricious, unlawful and unreasonable.

13 6. These policies and practices directly affect JUC's legal rights and economic
14 interests by damaging JUC's business reputation, by requiring JUC to operate its
15 wastewater treatment plants far below their legally permitted capacity, by preventing JUC
16 from serving new customers, and by preventing JUC from meeting the obligations
17 imposed on it by virtue of service requirements of the Arizona Corporation Commission
18 ("ACC") issuance of a certificate of convenience and necessity ("CC&N").

19 7. Accordingly, JUC requests declaratory and injunctive relief to require
20 Owens to act in accordance with the governing statutes and regulations.

21 **PARTIES, JURISDICTION AND VENUE**

22 **Plaintiff Johnson Utilities dba Johnson Utilities Company**

23 8. JUC owns and operates four wastewater treatment plants (collectively the
24 "Plants") including the:

- 25 a. Pecan Plant located at 38539 Gantzel Road, Queen Creek, Pinal County,
26 Arizona. The Aquifer Protection Permit ("APP") for this facility was

1 issued May 7, 2004 (Permit No. P-105324) and it authorizes the collection
2 and treatment of an average monthly flow of 999,998 gallons per day (gpd)
3 of wastewater; and the

4 b. Section 11 Plant located adjacent to the Hunt Highway, approximately nine
5 miles southeast of Queen Creek in Pinal County, Arizona. The APP for
6 this facility was issued September 4, 1998 (Permit No. P-103081) and
7 amended on June 12, 2002, and it authorizes the collection and treatment
8 of an average monthly flow of 1.6 millions gallons per day (MGD) of
9 wastewater; and the

10 c. San Tan Plant located adjacent to Hunt Highway within the San Tan
11 Heights Community. The APP for this facility was issued September 14,
12 2004 (Permit No. P-105324) and it authorizes the collection and treatment
13 of an average monthly flow of 1.0 million gallons per day (MGD) of
14 wastewater; and the

15 d. Precision Plant located adjacent to and south of Bella Vista Road within
16 the Johnson Ranch Community. The APP for this facility was issued April
17 8, 2004 (Permit No. P-105004) and it authorizes the collection and
18 treatment of an average monthly flow of 0.3 million gallons per day
19 (MGD) of wastewater.

20 9. Each of the Plants was permitted in accordance with the provisions of
21 A.A.C. R18-9-A201 *et seq.*, and the Plants are well within their respectively authorized
22 collection and treatment flow levels identified in their APPs.

23 **Defendants State of Arizona and Stephen A. Owens**

24 10. The State of Arizona has acted through its agency ADEQ, which was
25 created by A.R.S. § 49-102. Among other things, ADEQ is designated as the agency
26 responsible for issuing permits to wastewater treatment facilities under A.R.S. § 49-241,

1 and is also responsible for certifying that real property subdividers have sufficient water
2 and wastewater facilities available to construct and sell lots in new subdivisions under
3 A.R.S. § 49-104(11).

4 11. Stephen A. Owens is the Director of ADEQ and is sued in such capacity.

5 **Jurisdiction and Venue**

6 12. This Court has jurisdiction in accordance with A.R.S. §§ 41-1033(D) and
7 1034; A.R.S. § 12-1801; and A.R.S. § 12-1831.

8 13. JUC is not required to exhaust administrative remedies before filing this
9 action because A.R.S. § 41-1033(D) and § 41-1034 expressly authorize any person to file
10 an action for declaratory relief in superior court, and further provide that such action may
11 be "in addition to" or "in lieu of" an administrative petition or appeal.

12 14. Venue is proper in this Court under A.R.S. § 12-401(16) and A.R.S. § 41-
13 1034(B).

14 **GENERAL ALLEGATIONS**

15 15. In order to begin construction of permanent improvements on subdivided
16 real property, developers must obtain a Certificate of Approval for Sanitary Facilities
17 ("COA") from Owens. See A.A.C. R18-5-402.

18 16. Developers who propose to serve a new subdivision by connecting to
19 existing public sewerage systems must secure "a letter from officials of the system"
20 stating that "acceptable plans have been submitted and that the subdivider has been
21 granted permissions to connect to and become a part of the public sewerage system."
22 A.A.C. R18-5-407(B).

23 17. As part of the approval process, each subdivider is also required to submit
24 certain forms to Owens that identify the wastewater service provider for the development
25 in accordance with A.A.C. R18-9-E301(C)(1) and A.A.C. R18-9-E301(C)(2). These
26 forms (collectively the "Capacity Assurance" forms) require that the developer obtain

1 certain certifications from the owner/operator of the wastewater treatment plant that will
2 serve the subdivision. Specifically, the relevant plant owner/operator must certify that:

3 the additional volume of sewage delivered to the facility by
4 the sewer collection system serving the proposed subdivision
5 will not cause any flow or effluent quality limits of the
6 facility's individual permit to be exceeded; and

7 the sewer collection system . . . can maintain the performance
8 standards required under A.A.C. R18-9-E301(B) for the
9 increased flow from the proposed system.

10 See sample forms attached as Exhibit A.

11 18. In accordance with A.A.C. R18-5-407, certain subdividers within the
12 territory covered by the JUC's Plant CC&Ns have submitted applications to Owens
13 seeking approval to construct sanitary facilities for their subdivisions within
14 approximately the past eight (8) months.

15 19. Pursuant to the aforementioned application process, JUC has certified
16 various collection and treatment system capacities for developers seeking to connect to its
17 Plants.

18 20. Owens has refused to accept JUC's certifications and failed to continue
19 processing those applications based on policies or practices that are the subject of this
20 action.

21 **The Contested Policies and Practices**

22 21. On or about March 9, 2004, Owens adopted a written policy relating to
23 subdivision approvals. See Memorandum from Susan Hazelett, attached as Exhibit B
24 (hereafter the "March 9 Policy").

25 22. The March 9 Policy was not promulgated as a rule in accordance with
26 A.R.S. §§ 41-1021 to 1036. However, JUC does not object to the March 9 Policy because
the policy merely establishes a procedure for complying with existing laws and is wholly
consistent with existing statutes and regulations.

1 23. Since adopting the March 9 Policy, Owens has diverged from that policy
2 and has adopted new unwritten practices and policies that are inconsistent with the March
3 9 Policy.

4 24. These policies and practices are not within Owens' authority, and are
5 arbitrary, capricious, and otherwise unlawful. See correspondence between Greg Brown
6 of Specific Engineering (consultant to Johnson Utilities), John Shepardson of ADEQ and
7 Susan Hazelett of ADEQ (June 11, 2004) attached as Exhibit C.

8 25. Specifically, Owens has adopted a policy or practice of reviewing and
9 controverting Capacity Assurance certifications. Based on this review, Owens is refusing
10 to proceed with processing applications for approval of sanitary facilities. See, e.g., Letter
11 from Tanveer Faiz to Sam Malekooti regarding Magma Ranch-Phase I (Oct. 21, 2004);
12 Letter from Tanveer Faiz to Sam Malekooti regarding Magma Ranch-Phase II (Oct. 21,
13 2004); Letter from Kathleen Carson, P.E. to Matt Olsen and Kelly House regarding Circle
14 Cross Ranch, Parcel 6B (Aug. 18, 2004); Letter from Kathleen Carson, P.E. to Matt Olson
15 and Kelly House regarding Circle Cross Ranch, Parcel 8 (Nov. 2, 2004) attached as
16 Exhibit D. This policy will be described in more detail below.

17 26. This new policy or practice has the effect of a rule because it implements,
18 interprets, or prescribes law or policy within the meaning of A.R.S. § 41-1001. In
19 addition, it affects the substantive rights of JUC by imposing requirements on JUC not
20 otherwise specified by statute or regulation.

21 27. This policy or practice was adopted in violation of A.R.S. § 41-1030,
22 without notice, comment, publication, or any of the other rulemaking procedures required
23 by A.R.S. §§ 41-1001 to 41-1057.

24 **The Permanent Capacity Policy**

25 28. No statute or regulation authorizes Owens to controvert a capacity assurance
26 certification signed by the owner/operator of a permitted wastewater treatment plant with

1 an existing APP.

2 29. Moreover, no statute or rule authorizes or describes any procedure for an
3 independent, ad hoc assessment of wastewater treatment plant capacity, especially not
4 when an APP has already been properly granted.

5 30. Even if Owens were authorized to review and controvert capacity
6 determinations made by a licensed treatment plant operator, the standards Owens is
7 applying to make these determinations are unreasonable, arbitrary and capricious, and are
8 not set forth in any statute or any lawfully promulgated rule.

9 31. In undertaking the internal and independent assessment of treatment
10 capacity, Owens has evaluated pre-construction design flow estimates that were utilized
11 for planning processes rather than using actual post-construction flow data. Based on the
12 pre-construction design flow estimates, Owens has determined how much capacity Owens
13 believes exists at the Plants. *Id.*

14 32. As a result of utilizing the pre-construction design flow estimates, Owens
15 has determined that JUC does not have enough capacity at its Plants to meet the
16 permanent needs of planned subdivisions. *See e.g.,* correspondence from John
17 Shepherdson to Greg Brown (June 24, 2004) attached as Exhibit E.

18 33. No statute or regulation provides that a treatment plant operator must certify
19 that it has "permanent capacity" to serve new subdivisions.

20 34. Furthermore, no statute or rule authorizes or describes any procedure for
21 determining what may constitute "permanent capacity."

22 35. Owens' use of this subjective "permanent capacity" standard has the effect
23 of substantially reducing the permitted capacity of the Plants without a hearing or an
24 opportunity to respond.

25 36. Unless JUC commits to construct additional treatment facilities that it
26 otherwise has no current need to construct, Owens' new policies or practices will prevent

1 JUC from serving customers who now desire service and whom JUC may be legally
2 obligated to serve.

3 Harm to JUC

4 37. JUC is harmed because of the economic cost of operating its Plants far
5 below capacity, while Owens refuses to process applications of new customers.

6 38. JUC is further harmed because Owens has wrongly informed real property
7 developers that JUC does not have sufficient capacity to meet the needs of its customers,
8 thereby damaging JUC's business reputation and goodwill.

9 39. In addition, JUC is obligated to serve customers within the territory included
10 in its respectively authorized CC&Ns granted by the ACC.

11 40. If JUC fails to serve customers desiring service within its CC&N, its risks
12 the revocation or modification of its CC&N or other fines or sanctions imposed by the
13 ACC.

14 COUNT I: DECLARATORY JUDGMENT

15 41. Actual controversies have arisen and now exist between JUC and Owens as
16 to the following:

- 17 a. Whether Owens' policies and practices described herein constitute de facto
18 rules. JUC maintains that these policies and practices are rules, and should
19 have been subject to the formal notice, comment, and publication
20 requirements of A.R.S. § 41-1001, *et seq.* Owens disputes this contention.
- 21 b. Whether it is lawful for Owens to evaluate the "permanent capacity" of a
22 wastewater plant on an ad hoc basis after an APP has already been lawfully
23 issued, and when there is no statutory or regulatory definition of
24 "permanent capacity." JUC maintains that Owens' permanent capacity
25 investigations are arbitrary, capricious, unreasonable, and beyond the
26 authorization of Owens' governing statutes and rules. Owens disputes this

1 contention.

- 2 c. Whether Owens' use of preliminary planning design flow estimates to
3 evaluate the capacity of the Plants, instead of using readily available actual
4 flow data, is arbitrary, capricious, and unreasonable. JUC maintains that
5 there is no reasonable basis for using the preliminary estimates when more
6 accurate information is available, and that Owens' actions are therefore not
7 based on substantial evidence. Owens disputes this contention.

8 42. JUC desires a judicial declaration of it rights and duties, and a declaration as
9 to whether Owens' policies and practices described herein are lawful.

10 43. A judicial declaration is necessary and appropriate at this time because JUC
11 has no other prompt and adequate remedy at law or otherwise.

12 44. Moreover, the Arizona legislature has expressly established that it is the
13 public policy of this state to authorize declaratory relief under A.R.S. §§ 41-1033 and
14 1034 when an agency adopts a de facto rule without meeting the requirements of A.R.S.
15 § 41-1001 et seq.

16 WHEREFORE, JUC requests as follows:

- 17 a. A declaration that Owens' policies and practices complained of herein are
18 void and of no effect.
- 19 b. A declaration that, to the extent Owens believes that such policies and
20 practices are needed, that Owens must initiate a lawful rule making
21 proceeding in accordance with A.R.S. § 41-1001 et seq.
- 22 c. A declaration that Owens must resume processing subdividers' applications
23 for COA's when the applications contain certification forms signed by the
24 operator(s) of lawfully permitted wastewater treatment plants and collection
25 systems that are operating within their permitted capacity.
- 26 d. That JUC be awarded its attorneys' fees in accordance with A.R.S. § 12-

1 348 or other applicable law.

2 e. That JUC be awarded costs incurred in this matter.

3 f. That JUC receive such other and further relief as the Court deems just and
4 proper.

5 **COUNT II: INJUNCTION**

6 45. JUC has no adequate remedy at law or otherwise because Owens' unlawful
7 actions are causing continuing harm to JUC's economic interests and legal rights during
8 the pendency of this action.

9 46. In addition, JUC has no adequate remedy at law or otherwise because
10 Owens has taken action outside the lawful licensing process and the lawful rule making
11 process, thus preventing JUC from having access to any clear avenue of appeal.

12 47. JUC will suffer irreparable harm unless the defendants are enjoined because
13 Owens is continuing to apply the contested policies and practices, thereby preventing JUC
14 from serving planned subdivisions in its various CC&N territories.

15 48. Owens' actions have caused and are causing damage to JUC's business
16 reputation and a loss of goodwill between JUC and its customers, as well as the loss of
17 goodwill between JUC and the ACC. This loss of goodwill cannot be remedied by an
18 action for damages.

19 WHEREFORE, JUC requests as follows:

20 a. That a preliminary injunction issue enjoining the defendants Owens, and
21 Owens' agents, servants and employees from refusing to process
22 subdividers' applications for COAs when the applications contain
23 certification forms signed by the operator(s) of lawfully permitted
24 wastewater treatment plants and collection systems that are operating
25 within their permitted capacity, during the pendency of this action.

26 b. That, on a final hearing, a permanent injunction issue enjoining Owens and

1 Owens' agents, servants and employees from refusing to process
2 subdividers' applications for COAs when the applications contain
3 certification forms signed by the operator(s) of lawfully permitted
4 wastewater treatment plants and collection systems that are operating
5 within their permitted capacity.

- 6 c. That JUC be awarded its attorneys' fees in accordance with A.R.S. § 12-
7 348 or other applicable law.
8 d. That JUC be awarded costs incurred in this matter.
9 e. That JUC receive such other and further relief as the Court deems just and
10 proper.

11 DATED this 9th day of February, 2005.

12 FENNEMORE CRAIG

13
14 By

15 Jay L. Shapiro
16 Dawn Meidinger
17 Attorneys for Plaintiff
18 Johnson Utilities L.L.C.
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ATTACHMENT 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-002548

12/05/2005

HONORABLE RUTH H. HILLIARD

CLERK OF THE COURT
L. Gilbert
Deputy

FILED: 12/09/2005

LENNAR COMMUNITIES DEVELOPMENT
INC

LEO R BEUS

v.

SONORAN UTILITY SERVICES L L C, et al.

THOMAS K IRVINE

LAT J CELMINS
JAMES M JELLISON
DOCKET-CIVIL-CCC
FILE ROOM-CSC
PINAL COUNTY CLERK
RECORDS-CHANGE OF VENUE-CSC

MINUTE ENTRY

Defendants Pinal County and 387 District Defendants' Motion for Change of Venue has been under advisement. Having considered all memoranda submitted and the arguments of counsel, the Court finds and orders as follows.

Defendants seek a change of venue based on the mandatory language of A.R.S. §12-401(15) and (16), urging that the Pinal County Board of Supervisors is a governmental entity and that the individual defendants named are public officials. Plaintiff argues that these defendants are not statutorily authorized governmental entities or public officers. Even if they are so construed, plaintiff urges that allowing a change of venue will deprive plaintiff of its right to a change of venue under A.R.S. §12-408(A).

The Court finds that the Pinal County Board of Supervisors falls within the meaning of the term "county" in A.R.S. §12-401(15) and the individual Supervisors are public officers within the meaning of A.R.S. §12-401(16). The Court further finds that change of venue is mandatory under this statute.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-002548

12/05/2005

The Court is not persuaded that plaintiff's inability to obtain another change of venue under A.R.S. §12-408(A) is a sufficient legal reason to deny the moving defendants their entitlement to be sued in Pinal County.

IT IS ORDERED granting defendants' Motion for Change of Venue and venue is hereby transferred to Pinal County for all further proceedings.

IT IS FURTHER ORDERED that the Clerk of the Superior Court of Maricopa County transfer the file and all other documents to the Clerk of the Court, Pinal County, upon defendants paying the required transmittal fee within the time limits and in the amount provided in ARS §12-407, as amended.